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DISCUSSION

Awakening dormant law

– or the invocation of the European mutual assistance clause after the Paris attacks

CAROLYN MOSER — 19 November, 2015



The terrorist attacks of 13 November have violently confronted France as much as its European neighbours with exceptional security challenges. By killing more than 120 people in less than 30 minutes in the heart of Paris, the jihadist group ISIS (or *Daesh*, the Arabic acronym for the Islamic State of Iraq and the Levant) has demonstrated its operational capacity to hit European States in an extraordinary ferocious way. This alarming reality calls for well-calibrated collective European (re)action.

One of the measures announced by the French President, François Hollande, on 16 November was to invoke the mutual assistance clause enshrined in the Treaty on European

Union (TEU). The following day, the French Defence Minister, Jean Yves Le Drian, asked his European homologues for aid and assistance in conformity with Article 42(7) TEU. His request was unanimously granted by all 28 ministers and the mutual assistance clause activated.

What's in a name? – mutual aid and assistance

Kindly overlooked or at best criticised for its toothlessness in the past, the mutual assistance clause has made its way into EU primary law with the Treaty of Lisbon. Article 42(7) TEU, which is part of the provisions on the Union's Common Security and Defence Policy (CSDP), reads as follows:

If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.

As the reference to Article 51 of the UN Charter indicates, the provision is related to self-defence matters even though the wording alludes to an armed aggression and not to an armed attack (the French version of the above TEU stipulation uses the term '*agression armée*' as does the UN Charter). Whether a terrorist act committed by non-state actors constitutes an armed attack under Article 51 of the

UN Charter and whether this act can be attributed to a State is a disputed international law issue as illustrates the Congo case (ICJ, 2005, paras 146-147).

Leaving this difficult question aside, Article 42(7) TEU differs from other collective defence clauses, namely Article 5 of the Washington Treaty founding NATO and Article V of the modified Brussels Treaty creating the Western European Union (WEU). While the WEU ceased to exist in 2011, EU primary law has incorporated its defence legacy in Article 42 (7) – but with meaningful changes. Whereas Article V of the modified Brussels Treaty called for automatic assistance in the event of an attack, Article 42(7) TEU does not foresee any automatism.

Quite to the opposite, Article 42(7) TEU sets out a duty of aid and assistance, including by military means and, at the same time, contains a range of indeterminate criteria which allow Member States to alleviate the compliance character of the provision. First, national capitals are given a wide decisional leeway when determining which are ‘all the means in their power’. Second, the mutual assistance duty is or can be limited by the specificities of national foreign policies, such as the neutrality for military non-aligned countries or the requirement of parliamentary consent prior to troop deployment.

The TEU-clause comes hence closer to the collective defence provision in the NATO context which allows State Parties to assist the attacked nation by ‘such action as it deems necessary’. (Article 5 has been invoked only once, notably after the terrorist attacks of 9/11.) But the EU is not a defence organisation as is NATO. Indicative hereof is that the TEU underlines NATO’s prominent role in collective

defence: compliance with NATO commitments is a precondition for triggering a duty of mutual assistance in the EU framework.

Also, there are limitations to collective self-defence under EU primary law. The tasks which can be carried out under the framework of the Common Security and Defence Policy (CSDP) according to Article 43(1) TEU do not entail self-defence. Member States therefore need to go through NATO to exercise collective self-defence, also because procedural arrangements and operational capacities are lacking at the European level.

So in comparison to Article V of the Brussels Treaty, the pertinent EU provision does not trigger automatic (military) support but grants discretion to Member States. And as regards the difference of Article 42(7) TEU and Article 5 of the Washington Treaty, the EU's mutual aid and assistance both *de jure* and *de facto* unfolds within the broader NATO framework. All of abovementioned elements taken together, Article 42(7) TEU can thus be qualified as a mutual *assistance* rather than a mutual *defence* clause.

More than political symbolism

But what does the invocation of the mutual assistance clause actually imply? The short answer to this question is that nobody precisely knows. Both practitioners and scholars are uncertain regarding the effect of the activated mutual assistance clause as it has never been used before. So far, academic literature has regarded Article 42(7) TEU as symbolic with no relevance in practice. The statement made by the French Defence Minister on 17 November seems to echo this understanding: he qualified the invocation of

Article 42(7) TEU as a mainly political act – implying that it is symbolic in nature.

This, however, is not the whole story – and this brings us to the longer version of the answer. Paris is in reality looking for more than mere political, that is mainly discursive support. France is requesting her European neighbours to stand united against external security threats – not only by declaratory statements, but by concrete military commitments for activities outside of the Union's borders. This demand, in turn, will impact on the future course of European security and defence, a policy which France has always been keen to enhance.

Why 'mutual assistance' and not 'solidarity'?

The motivation of France is reflected by the anchor in EU law which the French Republic has chosen. Paris could have had recourse to Article 222 of the Treaty on the Functioning of the European Union (TFEU), the so-called 'solidarity clause' which is applicable in the event of a terrorist attack. Instead, France has consciously opted to rely on Article 42(7) TEU.

One can speculate that the rationale behind this choice is twofold. First, the wording of lit. a) of the first paragraph of Article 222 TFEU and Article 2 of the 2014 Council Decision setting out the arrangements for the implementation by the Union of the solidarity clause suggest that the scope of both the prevention of terrorist threats and the assistance provided by the EU and Member States in the event of a terrorist attack are geographically restricted to the territory of the attacked Member State. In the present situation, however, France aims at increasing support *outside* of her

territory and trans-border cooperation within the Union has been strengthened in any case.

Second, the mutual assistance clause is located in the Chapter on the security and defence (CSDP). By making reference to CSDP stipulations, Paris has decided in favour of an intergovernmental European reaction to the terrorist attacks of last week. As a result, negotiations on individual contributions will take place at a bilateral level between national governments within the framework of the CSDP – and the Union as such will only play a facilitating role.

Contrary to the comments made in other posts (see [here](#) and [here](#)), it is argued here that this move has not come as a surprise considering past French efforts to enhance European security and defence, and given the broader political context, including the at times tense transatlantic relation between Paris and Washington. France yields at generating more common, that is European efforts in the fight against terrorism and other external threats. It is therefore coherent that the current French thrust builds on the EU's expertise in both military and civilian crisis management under Article 43(1) TEU which is part of the CSDP.

It has to be stressed at this point that Article 222(3) TFEU also makes reference to crisis management structures and procedures governed by the TEU. But why taking a detour by supranational policies if there is a short-cut to the intergovernmental security and defence component of the EU?

What is next?

The activation of the mutual assistance clause has led to mixed reactions of national executives. A closer look at two other States which, together with France, constitute the 'Big Three' in EU foreign policy is telling. Germany offered long overdue military assistance in the EU training mission in Mali. This increased military engagement has, however, been planned before the Paris attacks happened. And again, the division of labour between Paris and Berlin follows the traditional pattern: while French troops are in charge of combat tasks, German experts take care of logistic support and training modules. The British government is facing resistance at home to join the US-led air strike campaign in Syria. It therefore remains to be seen which military aid and assistance Prime Minister David Cameron will eventually be able to offer.

While Member States are willing to enhance cooperation between intelligence services and police units, their inclination to engage in more robust external activities is weak. Bilateral negotiations between Paris and other European capitals are still on-going, but it would be sad – and dangerous – if triggering the mutual assistance clause would remain a purely symbolic act. Preventing instability and insecurity in the Middle East and Ukraine from spilling over to the Union is no easy task. It indeed will need resolve, joint efforts and a common vision to maintain the precious peace in Europe. The Paris attacks have been a dreadful reminder of this political necessity.

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